

FILED
110
SAN FRANCISCO COUNTY
SUPERIOR COURT

2009573-4 MAY 21 2010

BY: _____
FILED

1 ANDREW L. PACKARD (State Bar No. 168690)
Law Offices of Andrew L. Packard
2 319 Pleasant Street
Petaluma, CA 94952
3 Tel. (707) 763-7227
Fax. (707) 763-9227
4 E-mail: Andrew@PackardLawOffices.com

5 Attorneys for Plaintiff
STEPHEN D. GILLETT

CASE MANAGEMENT CONFERENCE SET

MAY - 7 2010 - 9⁰⁰ AM

DEPARTMENT 12

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

13 STEPHEN D. GILLETT, an individual,
14 Plaintiff,
15 v.
16 METAGENICS, INC., a corporation,
17 Defendant.

) Case No. **CGC-09-494987**
)
) **COMPLAINT FOR INJUNCTIVE**
) **RELIEF AND CIVIL PENALTIES**
)
) Health & Safety Code §25249.5, *et seq.*

19
20 Plaintiff Stephen D. Gillett brings this action in the interests of the general public and,
21 on information and belief, hereby alleges:

22 **INTRODUCTION**

23 1. This action seeks to remedy Defendant's continuing failure to warn thousands
24 of consumers in California that they are being exposed to lead, a substance known to the State
25 of California to cause cancer, birth defects and other reproductive harm. Defendant
26 manufactures, packages, distributes, markets, and/or sells in California certain herbal products
containing lead (collectively referred to hereinafter as the "PRODUCTS").

FILED BY FAX

1 2. Lead and lead compounds (hereinafter, the "LISTED CHEMICALS") are
2 substances known to the State¹ of California to cause cancer, birth defects and other
3 reproductive harm.

4 3. The use and/or handling of the PRODUCTS causes exposures to the LISTED
5 CHEMICALS at levels requiring a "clear and reasonable warning" under California's Safe
6 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code")
7 §25249.5, *et seq.* (also known as "Proposition 65"). Defendant has failed to provide the health
8 hazard warnings required by Proposition 65.

9 4. Defendant's continued manufacturing, packaging, distributing, marketing and/or
10 sales of the PRODUCTS without the required health hazard warnings, causes individuals to be
11 involuntarily and unwittingly exposed to levels of the LISTED CHEMICALS that violate
12 Proposition 65.

13 5. Plaintiff seeks injunctive relief enjoining Defendant from the continued
14 manufacturing, packaging, distributing, marketing and/or sales of the PRODUCTS in
15 California without provision of clear and reasonable warnings regarding the risks of cancer,
16 birth defects and other reproductive harm posed by exposure to the LISTED CHEMICALS
17 through the use and/or handling of the PRODUCTS. Plaintiff seeks an injunctive order
18 compelling Defendant to bring its business practices into compliance with Proposition 65 by
19 providing a clear and reasonable warning to each individual who has been and who in the
20 future may be exposed to LISTED CHEMICALS from the use of the PRODUCTS. Plaintiff
21 also seeks an order compelling Defendant to identify and locate each individual person who in
22 the past has purchased the PRODUCTS, and to provide to each such purchaser a clear and
23 reasonable warning that the use of the PRODUCTS will cause exposures to LISTED
24 CHEMICALS.

25
26 _____
¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

1 13. METAGENICS manufactures, packages, distributes, markets and/or sells one or
2 more of the PRODUCTS for sale or use in California.

3
4 **STATUTORY BACKGROUND**

5 14. The People of the State of California have declared in Proposition 65 their right
6 "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
7 reproductive harm." (Section 1(b) of Initiative Measure, Proposition 65).

8 15. To effect this goal, Proposition 65 requires that individuals be provided with a
9 "clear and reasonable warning" before being exposed to substances listed by the State of
10 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent
11 part:

12 No person in the course of doing business shall knowingly and intentionally
13 expose any individual to a chemical known to the state to cause cancer or
14 reproductive toxicity without first giving clear and reasonable warning to such
15 individual....

16 16. Proposition 65 provides that any person "violating or threatening to violate" the
17 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7.) The phrase
18 "threatening to violate" is defined to mean creating "a condition in which there is a substantial
19 likelihood that a violation will occur." (H&S Code §25249.11(e).) Violators are liable for civil
20 penalties of up to \$2,500 per day for each violation of the Act. (H&S Code §25249.7.)

21 **FACTUAL BACKGROUND**

22 17. On February 27, 1987, the State of California officially listed the chemical lead
23 as a chemical known to cause reproductive toxicity. Lead became subject to the warning
24 requirement one year later and was therefore subject to the "clear and reasonable" warning
25 requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of
26 Regulations ("CCR") §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

18. On October 1, 1992, the State of California officially listed the chemicals lead

1 and lead compounds as chemicals known to cause cancer. Lead and lead compounds became
2 subject to the warning requirement one year later and were therefore subject to the "clear and
3 reasonable" warning requirements of Proposition 65 beginning on October 1, 1993. (27 CCR §
4 25000, *et seq.*; H&S Code §25249.6, *et seq.*)

5 19. Plaintiff is informed and believes, and based on such information and belief
6 alleges the PRODUCTS have been distributed and/or sold to individuals in California without
7 clear and reasonable warning since at least November 4, 2006. The PRODUCTS continue to
8 be distributed and sold in California without the requisite warning information.

9 20. As a proximate result of acts by Defendant, as a person in the course of doing
10 business within the meaning of Health & Safety Code §25249.11, individuals throughout the
11 State of California, including in the County of San Francisco, have been exposed to the
12 LISTED CHEMICALS without clear and reasonable warning. The individuals subject to the
13 violative exposures include normal and foreseeable users of the PRODUCTS, as well as all
14 other persons exposed to the PRODUCTS.

15 21. At all times relevant to this action, Defendant has knowingly and intentionally
16 exposed the users and/or handlers of the PRODUCTS to the LISTED CHEMICALS without
17 first giving a clear and reasonable warning to such individuals.

18 22. Individuals using or handling the PRODUCTS are exposed to the LISTED
19 CHEMICALS in excess of the "maximum allowable daily" and "no significant risk" levels
20 determined by the State of California, as applicable, within the meaning of H&S Code
21 §25249.10(c).

22 23. At all times relevant to this action, Defendant has, in the course of doing
23 business, failed to provide individuals using and/or handling the PRODUCTS with a clear and
24 reasonable warning that the PRODUCTS expose individuals to the LISTED CHEMICALS.

25 24. The PRODUCTS continue to be distributed and sold in California without the
26 requisite clear and reasonable warning.

1 **FIRST CAUSE OF ACTION**
2 (Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning
3 those PRODUCTS described in Plaintiff's August 31, 2009 60-Day Notice of Violation)

4 25. Plaintiff realleges and incorporates by reference Paragraphs 1 through 24,
5 inclusive, as if specifically set forth herein.

6 26. On August 31, 2009, Plaintiff sent a 60-Day Notice of Proposition 65 violations
7 to the requisite public enforcement agencies and to Defendant ("First Notice"). The First
8 Notice was issued pursuant to, and in compliance with, the requirements of H&S Code
9 §25249.7(d) and the statute's implementing regulations regarding the notice of the violations to
10 be given to certain public enforcement agencies and to the violator. The notice given included,
11 *inter alia*, the following information: the name, address, and telephone number of the noticing
12 individual; the name of the alleged violator; the statute violated; the approximate time period
13 during which violations occurred; and descriptions of the violations, including the chemicals
14 involved, the routes of toxic exposure, and the specific products or type of products causing the
15 violations, and was issued as follows:

- 15 a. Defendant and the California Attorney General were provided copies of
16 the First Notice by Certified Mail.
- 17 b. Defendant was provided a copy of a document entitled "The Safe
18 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
19 Summary," which is also known as Appendix A to Title 27 of CCR
20 §25903.
- 21 c. The California Attorney General was provided with a Certificate of Merit
22 by the attorney for the noticing party, stating that there is a reasonable
23 and meritorious case for this action, and attaching factual information
24 sufficient to establish a basis for the certificate, including the identify of
25 the persons consulted with and relied on by the certifier, and the facts
26 studies, or other data reviewed by those persons, pursuant to H&S Code
§25249.7(h) (2).

1 Notice was issued pursuant to, and in compliance with, the requirements of H&S Code
2 §25249.7(d) and the statute's implementing regulations regarding the notice of the violations to
3 be given to certain public enforcement agencies and to the violator. The notice given included,
4 *inter alia*, the following information: the name, address, and telephone number of the noticing
5 individual; the name of the alleged violator; the statute violated; the approximate time period
6 during which violations occurred; and descriptions of the violations, including the chemicals
7 involved, the routes of toxic exposure, and the specific products or type of products causing the
8 violations, and was issued as follows:

- 9 a. Defendant and the California Attorney General were provided copies of
10 the First Notice by Certified Mail.
- 11 b. Defendant was provided a copy of a document entitled "The Safe
12 Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A
13 Summary," which is also known as Appendix A to Title 27 of CCR
14 §25903.
- 15 c. The California Attorney General was provided with a Certificate of Merit
16 by the attorney for the noticing party, stating that there is a reasonable
17 and meritorious case for this action, and attaching factual information
18 sufficient to establish a basis for the certificate, including the identify of
19 the persons consulted with and relied on by the certifier, and the facts
20 studies, or other data reviewed by those persons, pursuant to H&S Code
21 §25249.7(h) (2).

22 34. The appropriate public enforcement agencies have failed to commence and
23 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendant
24 based on the allegations herein.

25 35. By committing the acts alleged in this Complaint, Defendant at all times relevant
26 to this action, and continuing through the present, has violated H&S Code §25249.6 by, in the
course of doing business, knowingly and intentionally exposing individuals who use or handle

1 the PRODUCTS set forth in the First Notice to the LISTED CHEMICALS, without first
2 providing a clear and reasonable warning to such individuals pursuant to H&S Code §§ 25249.6
3 and 25249.11(f).

4 36. By the above-described acts, Defendant is liable, pursuant to H&S Code
5 §25249.7(b), for a civil penalty of \$2,500 per day for each unlawful exposure to a LISTED
6 CHEMICAL from the PRODUCTS.

7 Wherefore, plaintiff prays judgment against Defendant, as set forth hereafter.

8
9 **THE NEED FOR INJUNCTIVE RELIEF**

10 37. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 36,
11 as if set forth below.

12 38. By committing the acts alleged in this Complaint, Defendant has caused
13 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
14 of equitable relief, Defendant will continue to create a substantial risk of irreparable injury by
15 continuing to cause consumers to be involuntarily and unwittingly exposed to the LISTED
16 CHEMICALS through the use and/or handling of the PRODUCTS.

17
18 **PRAYER FOR RELIEF**

19 Wherefore, Plaintiff accordingly prays for the following relief:

20 A. a preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),
21 enjoining Defendant, its agents, employees, assigns and all persons acting in concert or
22 participating with Defendant, from distributing or selling the PRODUCTS in California
23 without first providing a clear and reasonable warning, within the meaning of Proposition 65,
24 that the users and/or handlers of the PRODUCTS are exposed to the LISTED CHEMICALS.

25 B. an injunctive order, pursuant to H&S Code §25249.7(b), compelling Defendant
26 to identify and locate each individual who has purchased the PRODUCTS since November 4,
2006 and to provide a warning to such person that the use of the Products will expose the user

1 to chemicals known to cause cancer, birth defects, and other reproductive harm.

2 C. an assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
3 against Defendant in the amount of \$2,500 per day for each violation of Proposition 65;

4 D. an award to Plaintiff of its reasonable attorneys fees and costs of suit pursuant to
5 California Code of Civil Procedure §1021.5, as Plaintiff shall specify in further application to
6 the Court; and,

7 E. such other and further relief as may be just and proper.

8 DATED: December 4, 2009

LAW OFFICES OF ANDREW L. PACKARD

9
10 

11 _____
12 Andrew L. Packard
13 Attorneys for Plaintiff
14 STEPHEN D. GILLETT
15
16
17
18
19
20
21
22
23
24
25
26